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FEDERAL COURTS-DETECTED VERDICTS IN CIVIL ACTIONS

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FEDERAL COURTS—DIRECTED VERDICTS IN CIVIL ACTIONS—"Juries must answer to questions of fact and judges to questions of law. This is the fundamental maxim acknowledged by the Constitution."[1] When no fact question is present, no right to jury trial in a civil suit exists, and the constitutional guaranty is, therefore, not violated by the exercise of control by the court in keeping the jury to determination of questions of fact or in keeping it within the bounds of reason.[2] One of the

[1] Scott, "Trial by Jury & the Reform of Civil Procedure," 31 HARV. L. REV. 669 at 677 (1918).

[2] See Skidmore v. B. & O. R. Co., (C.C.A. 2d, 1948) 167 F. (2d) 54, for an excellent discussion by Judge Frank of the necessity of judicial control of the jury.

most important and often used methods of control is the directed verdict,[3] whereby the court peremptorily instructs the jury to bring in a verdict for one of the parties and then enters judgment accordingly.[4]

These questions immediately suggest themselves: When is a fact question present? What test does the judge employ in deciding whether or not to direct a verdict? The law has recognized three different tests. The first, in point of time, is the so-called "scintilla" rule: if there is any evidence which tends to support the proponent's case, the court may not direct a verdict against him.[5] In 1857, English courts abandoned the "scintilla" rule,[6] and the United States Supreme Court did likewise in 1872.[7] Thus was born what is usually described as the "reasonable inference" rule: if there is any evidence from which the jury might *reasonably* infer the ultimate facts necessary to establish the proponent's case, the court may not direct a verdict against him. It must be noted that in both tests the court looks only at evidence favorable to the proponent; the difference is merely the shadowy one of degree.[8]

A. The "New Trial" Test

The federal courts soon evolved a third rule,[9] substantially different from the first two and giving the court maximum control over the jury. If the court, upon reviewing both the plaintiff's and the defendant's evidence, would be *bound* to set aside a verdict for one party as being against the weight of the evidence, it must direct the jury to find for the other party.[10] The vital distinction between this "new trial" test and

[3] First used in Syderbottom v. Smith, 1 Strange 649, 93 Eng. Rep. 759 (1725).

[4] For a criticism of the directed verdict method see Hackett, "Has a Trial Judge of a United States Court the Right to Direct a Verdict?" 24 YALE L. J. 127 (1914).

[5] Explained and rejected in Meyer v. Houck, 85 Iowa 319, 52 N.W. 235 (1892). The literal application of this test has probably been rejected in every state. See 33 MICH. L. REV. 136 (1934).

[6] Toomey v. London Ry. Co., 3 C.B. (n.s.) 146, 140 Eng. Rep. 694 (1857).

[7] Improvement Co. v. Munson, 14 Wall (81 U.S.) 442 (1872).

[8] This is exemplified by the difficulty of courts in drawing the line between the two tests. The evidence required by the "reasonable inference" rule is variously described as "more than a scintilla," "substantial," "clearly probative," etc. See 9 WIGMORE, EVIDENCE, 3rd ed., §2494 (1940).

[9] First suggested in Pleasants v. Fant, 22 Wall (89 U.S.) 116 (1874).

[10] Penn. R. Co. v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391 (1933); Southern Ry. Co. v. Walters, 284 U.S. 190, 52 S.Ct. 58 (1931), 30 MICH. L. REV. 1119 (1932); Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231 (1930); Daroca v. Metropolitan Life Ins. Co., (C.C.A. 5th, 1941) 121 F. (2d) 917. This is the same test which every court employs in setting aside a verdict and granting a new trial. Since this latter method of judicial control over the jury, i.e., granting a new trial, does not bar the proponent from bringing another action, some writers and lawyers feel it is a fallacy to employ the same test for both motions. See 22 TEX. L. REV. 359 (1943); and dissenting opinion by Justice Black in Galloway v. United States, 319 U.S. 372 at 399, 63 S.Ct. 1077 (1943). For an excellent defense of the "new trial" rule, see Smith, "The Power of the Judge to Direct a Verdict," 24 COL. L. REV. 111 (1924).

the others is that the federal court must look at all the evidence.[11] When we consider that the fundamental problem is one of determining whether there is an issue of fact, it is difficult to conceive how a court can make that determination without looking at the evidence on both sides.[12]

Thus, in *Pennsylvania Railroad Co. v. Chamberlain*[13] the deceased, who was employed in defendant's switchyard, was piloting two train cars which were coasting down a slope. A string of nine cars was being piloted on the same track behind him. Somehow, decedent fell off the car, was run over and killed. His administratrix brought suit under the Federal Employers Liability Act,[14] alleging that decedent's fall was caused by the negligent operation of the string of cars behind him in colliding with those on which he was riding. There were no eye-witnesses to the actual fall. Plaintiff had one witness, standing 900 feet from the place where decedent was found, who testified he heard a "loud crash." Shortly afterwards, he looked up, saw the two strings of cars "together" and the decedent missing. Looking at this alone, it would surely be reasonable for the jury to find that the two trains had collided. But three employees riding the nine-car string, corroborated by all other employees in a position to see, testified positively that no such collision occurred. The court directed a verdict for the defendant;[15] the Supreme Court, after considering the testimony on both sides, affirmed the trial court, saying ". . . no verdict based upon a statement so unbelievable, reasonably could be sustained as against the positive testimony to the contrary of unimpeached witnesses. . . ."[16]

B. Recent Trends of the Supreme Court

1. From 1941 to 1943

From the late 1920's until the early 1940's, the Supreme Court and other federal courts consistently followed the "new trial" test in all types of cases.[17] Beginning in 1941, however, a series of Supreme Court deci-

[11] Obviously, the "new trial" test is inapplicable when the defendant moves for a directed verdict at the close of the plaintiff's evidence only. This distinction must be borne in mind when reviewing federal cases.

[12] But, apparently, the majority of state courts find it possible. See 9 WIGMORE, EVIDENCE, 3rd ed., §2494 (1940) for a collection of authorities.

[13] 288 U.S. 333, 53 S.Ct. 391 (1933).

[14] 35 Stat. L. 65 (1908), as amended by 36 Stat. L. 291 (1910), 45 U.S.C. (1935) §§51 et seq.

[15] Reversed, (C.C.A. 2d, 1931) 59 F. (2d) 986.

[16] 288 U.S. 333 at 342, 53 S.Ct. 391 (1933).

[17] Chicago, Milw., & St. Paul Ry. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564 (1926) (F.E.L.A. case); Gulf, Mobile, & North R.R. Co. v. Wells, 275 U.S. 455, 48 S.Ct. 151 (1928) (F.E.L.A.); Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231 (1930) (malpractice); Pence v. United States, 316 U.S. 332, 62 S.Ct. 1080 (1942) (war risk ins.); Smails v. O'Malley, (C.C.A. 8th, 1942) 127 F. (2d) 410 (estate tax assessment); and many others.

sions has created a great deal of doubt as to the status of the "new trial" test in federal courts.

In *Berry v. United States*,[18] a suit on a war risk insurance policy, it was necessary for the plaintiff to prove that he was permanently and totally disabled prior to September, 1919. Suit was brought in 1932. He produced evidence that he had been seriously wounded in 1918, his left leg had been amputated, and subsequent infections prevented him from successful pursuit of any occupation. On this evidence, the trial court refused to direct a verdict for the United States. The circuit court of appeals,[19] in an opinion by Judge Learned Hand, reviewed all the evidence and reversed the trial court. The defendant's uncontroverted evidence was that the plaintiff was gainfully employed intermittently after 1919, and that the condition of his leg was not the sole reason for discontinuing work; in one case, by his own admission, he "wasn't making enough to live on." In view of *all* the evidence, the court felt that a conclusion that the plaintiff was permanently and totally disabled prior to September, 1919, would be so unreasonable that no question of fact was left for the jury. The Supreme Court, in a unanimous opinion written by Justice Black, reversed the circuit court of appeals. Although the application of the "new trial" test would not necessarily preclude such a reversal, it is clear that Justice Black refused to weigh the evidence. He looked only at the plaintiff's evidence in its most favorable light and concluded: "There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough."[20] If Justice Black meant (as it seems) that a fact question is always present if the plaintiff produces some evidence, despite the uncontroverted evidence of the defendant, the decision is clearly out of line with the *Chamberlain* case.

In *Pence v. United States*, [21] a suit by the beneficiary of a government life insurance policy, the United States contended that the policy had been reinstated by fraud; in particular, that the insured had represented he had never been treated for any disease and that he had never consulted any physician in regard to his health in the period between 1920 and 1927. The policy was reinstated in 1927. Thereafter, and several times before his death in 1934, he applied for disability compensation and, in so doing, directly controverted his previous statements. A government physician also testified that the insured had consulted him several times prior to 1927 concerning his health. The insured's wife

[18] 312 U.S. 450, 61 S.Ct. 637 (1941).
[19] (C.C.A. 2d, 1940) 111 F. (2d) 615.
[20] 312 U.S. 450 at 456, 61 S.Ct. 637 (1941).
[21] 316 U.S. 332, 62 S.Ct. 1080 (1942).

(plaintiff) testified that, to her knowledge, he had never consulted a physician and that the government's witness had treated him for a simple cold. Four witnesses for the plaintiff also testified that the insured had been in apparent good health and had led an active life. Thus, there was some evidence that the insured had not misstated any facts in his application for reinstatement of the policy but, rather, had misrepresented in his application for disability compensation. The Supreme Court held, three Justices dissenting, that the government's motion for a directed verdict made at the close of all the evidence should have been granted. The Court reasoned that, despite conflicting testimony, the insured's own admissions made so overwhelming a case for the government as to require the direction of a verdict in its favor, even though the government had the burden of proof. There was no room for reasonable doubt, or, in short, no question of fact.

The dissent by Justice Murphy, joined by Justices Black and Douglas, expressly denied the Court's power to evaluate the evidence to determine the existence of a fact question and asserted that the Court by so doing, was "... usurping the jury's function of determining, in the light of all the evidence, which of Pence's statements were true and which were false."[22]

The next year, in 1943, the Supreme Court decided two more cases involving the test to be used in directing a verdict. In both cases, the Court reasserted its faith in the "new trial" test by affirming the lower court's directing a verdict. In both cases, Justices Black, Murphy and Douglas dissented, expressing very clearly their disapproval of a court's power to weigh the evidence. In the dissenting opinion in *DeZon v. American President Lines, Ltd.*,[23] Justice Black said: "When we consider the weight of the evidence and resolve doubtful questions such as these, we invade the historic jury function."[24] One wonders, however, if Justice Black would think that the question were "doubtful" if he were willing to look at all the evidence. In the dissenting opinion in *Galloway v. United States*,[25] Justice Black emphasized the historical importance of jury trial, regretted the demise of the "scintilla rule" and condemned the practice whereby "... a judge might weigh the evidence to determine whether he, and not the jury, thought it was 'overwhelming' for either party and then direct a verdict."[26]

[22] Id. at 340.
[23] 318 U.S. 660, 63 S.Ct. 814 (1943).
[24] Id. at 674.
[25] 319 U.S. 372, 63 S.Ct. 1077 (1943).
[26] Id. at 404.

2. *Since 1943*

Thus, by 1943, a major split was apparent in the Supreme Court on the question of the proper ground for directing a verdict. Beginning in that year, and continuing to the present, a series of cases involving the Federal Employers Liability Act have faced the Court. Several factors combined to make these cases significant to this discussion: (1) a 1939 amendment to the F.E.L.A.[27] had expressed a policy of facilitating recovery by an injured employee, or his estate, against the railroad-employer; (2) the evidence required by the "new trial" test had often kept the employee's case from going to the jury;[28] and (3) a determination of facts by the jury almost invariably resulted in liability for the railroad-employer.[29] These factors, plus a strong minority opposing judicial power to weigh all the evidence, were enough to threaten the future existence of the federal "new trial" test.

Unfortunately, the Court generally has been extremely vague as to the test it has applied. Any analysis must depend upon what the Court has, in fact, *done*. In the first case, *Bailey v. Central Vermont Ry.*,[30] the decedent was working on a narrow train bridge, dumping cinders from a car through the tracks and onto the ground below. There was only a 12-inch footing on each side of the car and no guard rail. The decedent fell off the bridge and was killed. The negligence alleged was the defendant's furnishing the decedent with an unreasonably dangerous place to work. At the close of all the evidence, the trial court denied the defendant's motion for a directed verdict, and verdict and judgment were given for the plaintiff. The Supreme Court of Vermont reversed.[31] On appeal to the United States Supreme Court, the Vermont Supreme Court was reversed. In reaching its conclusion, the Court considered only the plaintiff's evidence and found it sufficient for the jury to find the defendant negligent. Inasmuch as the defendant's only

[27] 53 Stat. L. 1404 (1939), 45 U.S.C. (1946) §54, which took away the defense of assumption of risk. In Tiller v. Atlantic Coast Line, 318 U.S. 54, 63 S.Ct. 444 (1943), it was at least suggested that this amendment made the employer liable even if he were not negligent. This suggestion was explained and qualified in a concurring opinion by Justice Frankfurter, id. at 68.

[28] Gulf, Mobile, & Northern R. Co. v. Wells, 275 U.S. 455, 48 S.Ct. 151, (1928); Delaware, Lackawanna, & Western R. Co. v. Koske, 279 U.S. 7, 49 S.Ct. 202 (1929); Atlantic Coast Line v. Temple, 285 U.S. 143, 52 S.Ct. 334 (1932); Penn. R. Co. v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391 (1933).

[29] It is interesting to note that in the leading English case which rejected the "scintilla" rule, Toomey v. London Ry. Co., 3 C.B. (n.s.) 146, 140 Eng. Rep. 694 (1857), the court was prompted to do so because the jury invariably found the railroad liable.

[30] 319 U.S. 350, 63 S.Ct. 1062 (1943).

[31] 113 Vt. 8, 28 A. (2d) 639 (1942).

relevant evidence was that the bridge was the same type used by most other railroads, the conclusion would undoubtedly have been the same had the Court looked at all the evidence. Yet the opinion notably fails to consider the defendant's evidence.

In *Tiller v. Atlantic Coast Line*[32] the plaintiff's evidence showed that while decedent was working in the defendant's freight yard on the night of the accident, a locomotive was slowly pushing three cars in a back-up movement on the adjacent track. The end car struck and killed the decedent. The plaintiff alleged negligence in the defendant's failure to have a light on the back of the engine enabling the engineer to see a dark object for a distance of at least 300 feet, as required by a federal statute. Looking at this evidence alone, a finding that the alleged negligence was the cause of decedent's death would clearly be reasonable. The trial court submitted the case to the jury over the defendant's motion for a directed verdict. The circuit court of appeals reversed,[33] because the defendant's evidence showed that even had there been a light on the back of the engine, the cars would have blocked the light. In addition, the engine bell was ringing and a brakeman was riding the head car of the back-up movement with a lighted lantern in order to signal approach to a highway the train was about to cross. If the decedent was not sufficiently warned by the ringing bell and the lighted lantern, what possible warning could he have received from the diffused glow of an engine light? The inference of causation, in light of all the evidence, appears so unreasonable as to constitute no fact question at all. The Supreme Court, however, speaking through Justice Black, reversed the circuit court of appeals because it felt the diffused rays might have been sufficient to warn the plaintiff and, therefore, the case could not be taken from the jury. Surely the Court's decision is contrary to the *Chamberlain* case.

The most recent Supreme Court case is *Wilkerson v. McCarthy*.[34] The plaintiff, a railroad switchman, was injured when he fell from a greasy board into a repair pit. This board had been used by all employees to cross the pit. Some three months before the plaintiff sustained his injuries, the defendant erected safety chains which enclosed three sides of the pit; the fourth side was blocked by a railroad car when the pit was in use. The plaintiff, by squeezing through the narrow space between the end of the safety chain and the railroad car, entered the enclosed area to cross the pit. He charged the defendant with negligence for main-

[32] 323 U.S. 574, 65 S.Ct. 421 (1945).
[33] (C.C.A. 4th, 1944) 142 F. (2d) 718.
[34] (U.S. 1949) 69 S.Ct. 413.

taining the board in a greasy condition. The vital question was whether the use of the board by unauthorized employees, such as the plaintiff, had been so open and notorious since the erection of the safety chain that the defendant was charged with knowledge of such use. The testimony of the plaintiff and his witness, if true, established that three unauthorized employees had crossed the board a total of four times during the three-month period. Three witnesses for the defendant, employees who worked in or near the pit, testified that no employee, other than pit-men, had used the board since the erection of the chain. The trial court directed a verdict for the defendant and the Supreme Court of Utah affirmed.[35] The United States Supreme Court, speaking through Justice Black, reversed the Utah court, two justices dissenting.[36]

Admittedly, even with application of the "new trial" test, the evidence for the defendant might not be so overwhelming as to leave no room for reasonable doubt. It is clear, however, that the Court refused to look at all the evidence. In fact, Justice Black began his discussion of the evidence with the statement: *"It is the established rule* that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look *only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."*[37] If Justice Black was correct in his statement of the rule, it is clear that the Court has repudiated the "new trial" test without an express acknowledgment. That at least one justice was aware of Justice Black's refusal to apply the "new trial" test is made clear by the dissenting opinion of Justice Jackson:

> "This Court . . . to my mind at least, espouses the doctrine that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function. . . . Determination of whether there could be such a basis [for a finding of negligence] is a function of the trial court, even though it involves weighing evidence and examining facts."[38]

Actually, Justice Black may have been somewhat bold in his statement of the "established rule." True, of the twenty-one F.E.L.A. cases[39] decided by the Supreme Court between 1943 and the present, seventeen held that the lower court had improperly taken the case from the jury, one sustained the submission of the case to the jury, and only three

[35] (Utah 1948) 187 P. (2d) 188.
[36] Chief Justice Vinson and Justice Jackson.
[37] (U.S. 1949) 69 S.Ct. 413 at 415 (italics added).
[38] Id. at 424.
[39] These cases are collected, id. at 422.

sustained the lower court's taking the case from the jury. In several, however, the Court reviewed the entire evidence;[40] in others, although the plaintiff introduced very little evidence, the defendant produced *no* relevant evidence that could be balanced against the plaintiff's;[41] and, in two, the decision turned simply on the pleadings.[42] In none of the recent cases, with the possible exception of the *Wilkerson* case, has the Court expressly repudiated the "new trial" test.

C. *Recent Decisions of the Lower Federal Courts*

A review of recent decisions indicates that the lower courts are considerably more hesitant to state the applicable test for directing a verdict than they were prior to 1943 and, perhaps, that they are somewhat confused as well. Thus, in *Binder v. Commercial Travelers Mutual Accident Assn. of America*,[43] the court expressly denied itself the power to weigh the whole evidence and then proceeded to examine both the plaintiff's and the defendant's evidence, finding the question close enough to warrant jury trial. In *Lynch v. United States*,[44] the court stated the "new trial" test and then reviewed only the plaintiff's evidence, concluding that a question of fact was present which required a jury trial.

Lower court cases involving the F.E.L.A. for the most part follow the lead of the Supreme Court by refusing to review the entire evidence on a motion for directed verdict,[45] although several cases apply the "new trial" test.[46] In at least one case, *Cheffey v. Penn. R. Co.*,[47] a federal district court clearly interpreted the recent Supreme Court cases as a denial of the "new trial" test and, strangely enough, said so.

The plaintiff, an employee of the defendant railroad, was assigned

[40] Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232 (1943); Keeton v. Thompson, 326 U.S. 689, 66 S.Ct. 135 (1945); Hunter v. Texas Elec. R. Co., 332 U.S. 829, 68 S.Ct. 203 (1947); Ellis v. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598 (1947).

[41] Tennant v. P.U.R. Co., 321 U.S. 29, 64 S.Ct. 409 (1944); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946); Myers v. Reading Co., 331 U.S. 477, 67 S.Ct. 1334 (1947).

[42] Anderson v. Atchison, T. & S. F. Ry. Co., 333 U.S. 821, 68 S.Ct. 854 (1947); Lillie v. Thompson, 332 U.S. 459, 68 S.Ct. 140 (1947).

[43] (C.C.A. 2d, 1948) 165 F. (2d) 896.

[44] (C.C.A. 2d, 1947) 162 F. (2d) 987.

[45] Waddell v. Chicago & Eastern Ill. R. Co., (C.C.A. 7th, 1944) 142 F. (2d) 309; Griswold v. Gardner, (C.C.A. 7th, 1946) 155 F. (2d) 333; Fleming v. Husted (C.C.A. 8th, 1947) 164 F. (2d) 65; Keith v. Wheeling & Lake Erie Ry. Co., (C.C.A. 6th, 1947) 160 F. (2d) 654.

[46] Boston & Maine R. Co. v. Cabana, (C.C.A. 1st, 1945) 148 F. (2d) 150; Terminal Railroad Assn. of St. Louis v. Schorb, (C.C.A. 8th, 1945) 151 F. (2d) 361; Skidmore v. B. & O. R. Co., (C.C.A. 2nd, 1948) 167 F. (2d) 54; Wolfe v. Henwood, (C.C.A. 8th, 1947) 162 F. (2d) 998. In all but the last case cited, however, jury trial was nevertheless granted.

[47] D.C. Pa. (1948) 79 F. Supp. 252.

to removing steel bands from a railroad freight car. While pulling one band at a time towards the door of the car, and walking backwards, she stepped into a hole at the other end of the car, fell to the floor, and sustained injuries. The plaintiff charged negligence because of the defendant's failure to furnish sufficient helpers, but the only supporting evidence was that a helper had occasionally been furnished in the past. The defendant's uncontroverted evidence was that the task was light, and that two persons were assigned only when a large quantity or a time factor was involved. At the close of all the evidence, the defendant moved for a directed verdict on which the judge reserved ruling. The verdict was for the plaintiff and the defendant moved for judgment on the motion or, in the alternative, a new trial. In considering the motion for a directed verdict, the court looked at only the plaintiff's evidence and concluded there was some evidence of negligence, therefore refusing to give judgment on the motion for a directed verdict. "In other words, we must not weigh the evidence or consider the contradictory and conflicting evidence. . . ."[48] However, in considering the defendant's motion for a new trial, the court said a different test must be applied! "Here we must consider the testimony as a whole and weigh the evidence."[49] It thereupon found the verdict against the weight of the evidence and granted a new trial.

The "new trial" test does not require that, whenever the court exercises its discretion in granting a new trial, it should, rather, direct a verdict. Only when the evidence is so overwhelming that the court would be *bound* to grant a new trial if a verdict were returned against the moving party must the court grant his motion for a directed verdict. For both motions, however, the court must consider all the evidence. In the *Cheffey* case, the district court, relying on recent Supreme Court cases, expressly repudiated the "new trial" test and, therefore, resumed the anomalous practice that often results in a court's refusing to direct a verdict for the defendant, while being bound to grant a new trial in the event of a verdict for the plaintiff.[50] In most federal cases not involving the F.E.L.A., however, the court states and applies the "new trial" test with no indication of even being aware of the recent Supreme Court cases.[51]

[48] Id. at 258.

[49] Id. at 259.

[50] See note 10, supra.

[51] Roth v. Swanson, (C.C.A. 8th, 1944) 145 F. (2d) 262 (negligence action); Mutual Life Ins. Co. of N.Y. v. Asbell, (C.C.A. 4th, 1947) 163 F. (2d) 121 (insurance); Shewmaker v. Capital Transit Co., (App. D.C. 1944) 143 F. (2d) 142 (negligence); Ryan Distributing Corp. v. Caley, (C.C.A. 3d, 1945) 147 F. (2d) 138 (patent infringement); Commercial Standard Ins. Co. v. Gordon's Transports, Inc., (C.C.A. 6th, 1946) 154 F. (2d) 390 (accident insurance); Montrose v. Nelson, (D.C. N.J. 1948) 79 F. Supp. 443.

D. Conclusions

Perhaps it would be premature to conclude that the "new trial" test has been definitely repudiated by the Supreme Court. True, Justice Black has expressed his opposition to the "new trial" test in opinions he has written for the Court involving the F.E.L.A. That the majority of the Court would go along with him on this question in cases not involving the F.E.L.A., however, is not at all clear. At any rate, lower federal courts, in cases not involving the F.E.L.A., have not been greatly influenced by the recent Supreme Court cases. It is hardly likely, however, that the Supreme Court will favor one rule for F.E.L.A. cases and another rule for non-F.E.L.A. cases. The basis of recovery under the F.E.L.A. is still negligence. To say that a question of fact is present in a negligence case involving the statute when precisely the same facts would not present a question of fact in a case not involving the statute, would be totally unjustifiable. Inasmuch as the "new trial" test was the result of a long series of Supreme Court cases dating back to 1872, it would be most unfortunate if the Court, if and when it states a uniform rule, were to retrogress towards the long-abandoned "scintilla" rule.

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